

December 30, 1997

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE LEO VIVIAN SIMS, also
known as Leo V. Sims,

Debtor.

BAP No. NM-97-022

LEO VIVIAN SIMS,

Appellant,

Bankr. No. 96-14099
Chapter 11

v.

ALINE SIMS, Individually and as
Personal Representative of the Estate
of George P. Sims, Deceased,

Appellee.

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, PEARSON, and CORNISH, Bankruptcy Judges.

PER CURIAM.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore submitted without oral argument.

This is an appeal by Leo Vivian Sims, the chapter 11 debtor ("Debtor"),

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

from an “Order Appointing Trustee and Eliminating Plan Exclusivity Period” entered by the United States Bankruptcy Court for the District of New Mexico. For the reasons set forth below, we AFFIRM the Bankruptcy Court.

I. BACKGROUND

The Debtor is an individual engaged in cattle ranching, oil and gas production, and commercial real estate in New Mexico. For several years, the Debtor and numerous members of his family have been engaged in a contentious state court lawsuit (“State Court Action”) involving the family’s business holdings. The State Court Action was commenced by the Debtor and several members of his family (collectively, the “Plaintiffs”) against Aline Sims, his deceased brother’s wife (“Sims”), alleging conversion and seeking partition of realty, dissolution of partnership, and a declaratory judgment. Sims, individually and as a personal representative of her late husband’s estate, filed a counterclaim against the Plaintiffs alleging the same causes of action that they had asserted against her. Several of the causes of action were settled by the parties, several were tried by the state court. Ultimately, the state court rendered a decision that was not favorable to the Debtor regarding the ownership and the right to distribution of proceeds from six contracts with various pipeline companies permitting the collection and sale of a liquid hydrocarbon product produced in association with natural gas, commonly referred to as “drips.”

In September 1996, prior to the state court’s entry of a judgment against him in the drips matter, the Debtor filed a petition seeking relief under chapter 11 of the Bankruptcy Code. In November 1996, Sims filed a “Motion to Eliminate Exclusivity Period, or For Appointment of a Chapter 11 Trustee” (“Trustee Motion”) alleging that: (1) but for the Debtor’s bankruptcy case, the state court would have awarded Sims a multimillion dollar judgment against the Debtor individually; (2) the Debtor had made fraudulent transfers within one year of filing bankruptcy and converted otherwise non-exempt property to exempt

property with an intent to hinder, defraud, or delay Sims in collecting any judgment that would be rendered against him in the drips matter; (3) the Debtor would not pursue the fraudulent transfers because he had made them to his insider-family members; and (4) the Debtor had engaged in postpetition fraud by not fully disclosing his assets and debts in his statements and schedules, and was grossly mismanaging his affairs. With regard to the fraudulent transfers, Sims alleged that the Debtor, with an intent to hinder, delay, and defraud her and for less than reasonably equivalent value, mortgaged previously unencumbered property to some relatives in exchange for cash which he then used to purchase an annuity which was presumably exempt under New Mexico law.

In December 1997, the Debtor amended his schedules and statement of affairs. Later in the month, the Bankruptcy Court held a preliminary hearing on the Trustee Motion, at which the Court set a trial date of January 24, 1997. On January 17, 1997, the Debtor filed his first disclosure statement and plan of reorganization. The trial date on the Trustee Motion was thereafter rescheduled until February 25, 1997. After the hearing was rescheduled, and after significant pressure from Sims, the Debtor filed a fraudulent transfer complaint related to the annuity transaction in which he admitted that the transfers related to that transaction were done with actual intent to hinder, defraud, or delay payment to Sims. Appellee's Appendix, p. 54. In the meantime, the Bankruptcy Court granted a motion by Sims seeking relief from stay to allow entry of the judgment against the Debtor in the State Court Action regarding the drips matter.

The Bankruptcy Court presided over a two-day trial on the Trustee Motion on February 25 and 26, 1997, at which time the Debtor, the Debtor's accountant, the family's accountant, and an agricultural expert testified. At the end of the testimony the Bankruptcy Court stated, in relevant part, that:

First of all, I think that I'm compelled to appoint a trustee. And so I will tell you why I think I am compelled to appoint a trustee, but what is probably more important in my mind is why I should appoint a trustee for the benefit of everybody.

Section 1104 says I shall appoint a trustee for . . . fraud, dishonesty, gross mismanagement or if it's in the best interest of the creditors.

Mr. Sims has now filed his fraudulent conveyance action and I commend him for doing it. It had to be done, I think. He carries the baggage of the fact that he admits, he alleges and therefore admits and says that there is competent proof of his intent, which was to hinder, defraud or delay creditors by making these various transactions. I am not positive that is the fraud which is described in Section 1104, but I think it is probably gross mismanagement. If you mismanage your assets by concealing them from creditors, that's probably gross mismanagement.

So, I think that is a ground for the appointment of a trustee.

. . . .

Second, I think that the evidence is pretty clear here that Mr. Sims has no personal services income, as that term is defined in Section 541, I believe it is.

He has some exempt income, the Social Security, but if he has no personal services income and he is going to try to live, he has to be depleting the estate, and that's detrimental to creditors, and that is a ground for appointment of a trustee and warrants that being done.

. . . .

Three, I think that Mr. Sims has, as a matter of practice, made payments to or for the benefit of his sons. In that respect, I think that he has used the income that is available from oil and gas and mineral activity and from rentals and things of that sort to support or supplement the support of his sons. That's not in the best interest of creditors. They are not dependents and he owes them no duty of support. It takes money away from creditors.

. . . .

Okay, it is important for us to think about where we are going with this case, and therefore why we should all support the appointment of a trustee.

. . . .

We should appoint a trustee in this case because you have got to have somebody who is going to make an impartial determination about whether to pursue the appeal of the [judgment in the State Court Action].

Now, [the Debtor] very candidly told me how he felt about the obligation that the State court has found that he owes to Ms. Aline Sims, and he says he doesn't think he owes it. He doesn't feel he owes it, and having said that, I would not expect him to be capable of making an impartial, informed judgment about whether he can win or lose that appeal. How could anybody carry that baggage to the table to make that kind of judgment?

Because really, what we are talking about here is not who is right or

who is wrong. What we are talking about is whether the appeal can be pursued successfully. How much does it cost and who should pay for it.

So, that's what the creditors are entitled to in this case, and that is what will benefit [the Debtor]. . . . It may also make him appreciate the fact that somebody [that] has no stake in this case makes the judgment call of whether he is right or wrong.

Two, we need someone impartial in this case who can make liquidation decisions. There are obviously going to be in this case at some point in time, problems with whether something has to be sold, when it has to be sold and what has to be sold and who would be affected by it.

. . . .

Three, we need someone to broker the plans. We need someone who is impartial, that everybody can talk to It will get the job done a lot cheaper and a lot quicker.

Next, we need somebody who can impartially pursue avoidance claims.

. . . .

So, for those reasons, I will direct the U.S. Trustee to appoint a trustee

Appellant's Appendix, Vol. II., pp. 159-161. In addition to appointing a trustee, the Bankruptcy Court granted that portion of Sims's motion seeking to eliminate the remaining exclusivity period. On March 11, 1997, the Bankruptcy Court entered an Order Appointing Trustee and Eliminating Plan Exclusivity Period. This appeal followed. The only issue raised on appeal is whether the Bankruptcy Court erred in appointing a chapter 11 trustee; the propriety of the portion of the order dealing with the exclusivity period has not been raised.

II. DISCUSSION

The appointment of a trustee in a chapter 11 case is governed by section 1104(a) which states, in relevant part, that:

At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest . . . and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause . . . ; or

(2) if such appointment is in the interest of creditors . . . and other

interests of the estate

11 U.S.C. § 1104(a). The “language of the statute and established case law [make clear] that the court need not find any of the enumerated wrongs [under section 1104(a)(1)] in order to find cause for appointing a trustee. It is sufficient that the appointment be in the interest of creditors [under section 1104(a)(2)].” Oklahoma Refining Co. v. Blaik (In re Oklahoma Refining Co.), 838 F.2d 1133, 1136 (10th Cir. 1988) (citations omitted); see 11 U.S.C. § 1104(a) (appointment of a trustee is appropriate if the elements of subsection (1) “or” subsection (2) are met). While an extraordinary remedy, once a bankruptcy court determines that “cause” exists for appointment of a trustee under section 1104(a)(1) or that appointment of a trustee would be in the best interest of creditors under section 1104(a)(2), “it has no discretion but must appoint a trustee.” Oklahoma Refining, 838 F.2d at 1136.

The Bankruptcy Court concluded that it was compelled to appoint a trustee under section 1104(a). According to the Bankruptcy Court, “cause” existed to appoint a trustee under section 1104(a)(1) because the Debtor’s prepetition concealment of assets with an admitted intent to hinder, delay, or defraud Sims constituted “gross mismanagement.” The Bankruptcy Court also determined that the Debtor’s lack of personal services income and payments to insiders supported its finding of “cause” under section 1104(a)(1). More importantly, however, the Bankruptcy Court found that the appointment of a trustee was in the best interest of creditors and the estate as required under section 1104(a)(2) because a trustee: (1) would be able to make an impartial decision as to whether to pursue an appeal of the judgment in the State Court Action, which the Debtor could not; (2) would make liquidation decisions that may be difficult or impossible for the Debtor to make; (3) would reduce time and costs in reorganizing the Debtor; and (4) would impartially pursue avoidance actions.

The Debtor maintains that the Bankruptcy Court should be reversed

because it erred under section 1104(a)(1) in finding: (1) gross mismanagement based upon the Debtor's alleged prepetition fraudulent transfers that were being corrected by the Debtor postpetition; (2) a lack of personal services income; and (3) that the Debtor was engaging in "illegal conduct" by paying his sons for work on his cattle ranches from oil and gas royalties. Appellant's Brief, pp. 1-2. The Debtor also contends that the Bankruptcy Court should be reversed because it erred in appointing a trustee under section 1104(a)(2) without balancing the costs and benefits of the appointment to the estate. Id.

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Pierce v. Underwood, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013; Fowler Bros. v. Young (In re Young), 91 F.3d 1367, 1370 (10th Cir. 1996). We must decide whether the Bankruptcy Court applied the correct law under section 1104(a) and, if so, whether, it was correct in appointing a trustee. If we conclude upon *de novo* review that the correct legal standard was applied, this Court's "authority is limited to determining if the Bankruptcy Court's determination [to appoint a trustee] was clearly erroneous." Oklahoma Refining, 838 F.2d at 1136. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (cited in Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)).

After conducting a *de novo* review of the law and evaluating the entire record, we conclude that the Bankruptcy Court should be affirmed. In so holding, we find that there is no need to address the three issues the Debtor has raised under section 1104(a)(1) because the Bankruptcy Court applied the correct legal standard under section 1104(a)(2) and its conclusion that the appointment of

a trustee was in the best interest of creditors and other interests of the estate was not clearly erroneous. See 11 U.S.C. § 1104(a); Oklahoma Refining, 838 F.2d at 1136.

The Debtor argues that the Bankruptcy Court erred in finding that the appointment of a trustee was in the interests of creditors and other interests under section 1104(a)(2) because it did not balance the costs and benefits of appointing a trustee. He cites In re Stein and Day, Inc., 87 B.R. 290, 295 (Bankr. S.D.N.Y. 1988), for the proposition that a cost-benefit test is required under section 1104(a)(2). This case, which is not binding in this jurisdiction, does not so hold. It merely provides a standard that courts may use in conducting a cost-benefit analysis.

It was not necessary for the Bankruptcy Court to conduct a formal cost-benefit analysis in order to appoint a trustee under section 1104(a)(2). The legislative history to that subsection states that: “The second test, relating to the costs and expenses of a trustee, is not intended to be a strict cost/benefit analysis. It is included to require the court to have due regard for any additional costs or expenses that the appointment of a trustee would impose on the estate.” H.R. No. 595, 95th Cong., 1st Sess. 402 (1977).

It is clear from the record that the Bankruptcy Court, in making its determination under section 1104(a)(2), had due regard for administrative costs in the case. See Appellant’s Appendix, Vol. II, p. 160-161. Indeed, the Bankruptcy Court determined that a trustee, as an objective party, may actually decrease costs of administering the estate. Id. The Bankruptcy Court also determined that appointment of a trustee was beneficial to all interests. Id. Thus, is it clear from the record that the Bankruptcy Court believed that the obvious administrative costs associated with a trustee were outweighed by its overriding concern--having the case handled by an objective party.

The Debtor also argues that the Bankruptcy Court did not consider the

interests of all parties, but only the interests of Sims. This is not accurate. Integral to the Bankruptcy Court's ruling was its appraisal of the interests of all involved in the case. It concluded that a trustee would be beneficial to all creditors and to the Debtor himself. Id. That a trustee would be beneficial to all interests in the case is supported by the record. The highly charged family conflict between the Plaintiffs and Sims was the primary focus of the Debtor's bankruptcy case. As a result, the feelings of animosity between the parties involved made it difficult for any party to act objectively. Furthermore, no creditor or party in interest objected to the Trustee Motion.

Finally, the Debtor contends that the Bankruptcy Court should have appointed an examiner, as opposed to a trustee in this case, and that the appointment of an examiner was agreed to by Sims. This argument is flawed. First, the record does not support that Sims agreed to the appointment of an examiner. See Appellant's Appendix, Vol. II, p. 159. Second, the Bankruptcy Court's conclusion to appoint a trustee is supported by the record and, therefore, it was required under section 1104(a) as a matter of law. See 11 U.S.C. § 1104(a); Oklahoma Refining, 838 F.2d at 1336. Appointment of an examiner is appropriate only in the event that the appointment of a trustee is not required. 11 U.S.C. § 1104(c).

III. CONCLUSION

For the reasons stated above, we hereby AFFIRM that portion of the Order of the Bankruptcy Court appointing a chapter 11 trustee.